Tender for operating light refreshment business at a park under Leisure and Cultural Services Department
Investigation Report

In June 2024, this Office received a complaint from two complainants against the Leisure and Cultural Services Department ("LCSD").

The Complaint

2. The complainants had been the service provider of LCSD, with a permit ("Permit A") to operate light refreshment business at a kiosk in a park ("the Park") under the management of the Department.

3. The complainants alleged that LCSD's tender procedures for Permit A was confusing. In particular, LCSD staff had called the complainants before the close of tender, suggesting that they raise the monthly permit fee offered in their tender. Also, shortly after the complainants had restored the business premises to original status for LCSD's repossession upon the telephone notification from an LCSD staff that their tender was unsuccessful, LCSD then issued a letter of acceptance regarding their tender offer of February 2024.

Our Findings

Sequence of Events Regarding Tender for Permit A

4. The contract of Permit A was set to expire on 30 September 2023. According to information from LCSD, it conducted two tender exercises for the new contract of Permit A. Key events of the tender exercises are set out below:

	Date	Event
First tender exercise		
(1)	28 Jun **2023**	LCSD issued an invitation to tender, open until 26 July 2023, for Permit A's new contract.

	Date	Event
(2)	26 Jul	LCSD received two conforming tenders (including one submitted by the complainants).
(3)	Sep to Oct	After consulting the Rating and Valuation Department ("RVD") on the prices offered in the two tenders, LCSD was advised that it was unreasonable to accept the tender prices from a valuation point of view.
(4)	22 and 30 Nov	LCSD's Tender Board approved the cancellation of the first invitation to tender and notified the complainants and the other tenderer by letter on 30 November.
Second tender exercise		
(5)	1 Feb **2024**	LCSD issued the second invitation to tender, open until 27 February 2024, for Permit A's new contract.
(6)	27 Feb	LCSD received only one conforming tender, which was submitted by the complainants.
(7)	Mar to early Apr	After consulting RVD on the price offered in the above tender, LCSD was advised to negotiate the monthly fee of Permit A with the tenderer for re-assessment.
(8)	Early Apr	Mr X, an LCSD staff, called one of the complainants, Ms B, to enquire if she was willing to raise the tender price of the monthly permit fee, but she refused.
(9)	19 Apr	Mr X called Ms B again and verbally notified her that their tender was unsuccessful, and requested her to clear out the business premises at the Park.
(10)	9 to 14 May	LCSD sought further advice from RVD on the monthly fee of Permit A with supplementary information and justification. RVD replied that the complainants' tender price was not unreasonable from a valuation point of view.

	Date	Event
(11)	17 May	Mr X and staff of the Architectural Services Department ("ArchSD") inspected the kiosk at the Park jointly with Ms B in the morning. Ms B was requested to follow up on the demolition of fixtures within the business premises. On the afternoon of the same day, Mr X called Ms B to enquire if she was willing to accept Permit A's new contract, starting on 1 June 2024 at their tender price, but Ms B refused.
(12)	21 May	Another LCSD staff, Mr Y, called Ms B to enquire if she would accept Permit A's new contract with starting date deferred to 1 July 2024, but Ms B refused. Mr Y requested Ms B to cancel the price proposal by writing to LCSD, but Ms B refused.
(13)	12 and 17 Jun	LCSD issued a Notice of Conditional Acceptance of Tender ("the Notice") to Ms B in respect of the tender for Permit A. On 17 June, LCSD received Ms B's reply that she refused to accept the Articles of Agreement for Permit A.
(14)	12 Jul	LCSD issued a letter to the complainants confirming their withdrawal from entering into the agreement for Permit A.

Response from LCSD

5. LCSD said that in the first tender exercise for the new contract of Permit A, RVD considered the prices offered by the tenderers to be below market levels and unreasonable from a valuation point of view. Taking account of RVD's advice, LCSD's Tender Board decided to cancel the tender. In the second tender exercise, although RVD still considered the price offered in the sole tender (submitted by the complainants) to be unreasonable, LCSD reckoned with the fact that the tender for Permit A had already failed once, there was no guarantee that a higher price offer would be received even if the tender was initiated again, and this would cause delays to the tender exercise. After consulting RVD again, LCSD therefore assigned Mr X to

contact Ms B, based on Clause 30 [Note] of the Terms of Quotation, to enquire if she was willing to propose a higher monthly permit fee.

6. LCSD pointed out that Permit A was set to expire on 30 September 2023. Based on the conditions of contract, the complainants were obliged to clear out the kiosk premises at the Park, demolish the fixtures therein, and restore the premises to original status for LCSD's repossession by the expiry date. According to Mr X's written statement, during a telephone call with Ms B on 19 April 2024, he notified her that their tender was unsuccessful and requested her to remove from the premises any fixtures and items not provided by the Government; during the conversation, he did not use the words "tender failed". Since no written notification had been received from the complainants regarding withdrawal of the offer or cancellation of the price proposal, LCSD issued the Notice to Ms B on 12 June 2024 based on the procedures. As regards why the effective date of new contract was different from the date specified in the invitation to tender (originally set for 1 May 2024), LCSD explained that the Terms of Quotation stipulated that a tender submitted shall remain valid for 150 days from the Tender Closing Date, and the Government Representative shall be entitled to advance or defer the commencement of the permit period for whatsoever reasons. In this case, to allow sufficient time for the administrative work of the contract, LCSD deferred the effective date of new contract to 1 July 2024.

7. After reviewing the tender exercises for Permit A, LCSD noted that Ms B had verbally enquired with Mr X about the tender results on multiple occasions. However, due to inadequate communication among relevant staff within the department, Mr X was unable to grasp the situation of the ongoing liaison between LCSD and RVD in respect of valuation, which could easily lead to misunderstanding. Besides, regarding the negotiation on raising the monthly fee for Permit A, although Mr X wished to sound out Ms B more quickly by verbal means, LCSD considered such an approach unsatisfactory. While the manner of negotiation was not specified in the tender document, LCSD considered that written enquiry would have been more appropriate to minimise misunderstanding and enable the complainants to better understand the relevant terms.

[Note] In the second tender exercise for Permit A, Clause 30 of the Terms of Quotation stipulated that:

"Negotiation:

The Government reserves the right to negotiate with any Service Provider on the terms of the Service Provider's Quotation and conditions of the Contract."

Our Comments

8. LCSD had given details about the two tender exercises for Permit A. As it explained, in handling the second tender exercise, LCSD had taken account of the fact that the tender price was below the valuation, the tender for Permit A had already failed once, and the advice from RVD. Hence, it decided to attempt negotiation with the complainants based on the Terms of Quotation, and enquired if they would be willing to raise the monthly fee for Permit A for re-assessment. We find nothing wrong with this approach. Meanwhile, LCSD issued the Notice to the complainants despite Ms B's verbal refusal to accept the new contract on several occasions, because no written notification had been received from them regarding cancellation of the price proposal or withdrawal of the tender (see **para. 6**). As such, LCSD continued to issue the Notice to the complainants based on the Terms of Quotation and procedures, and requested their formal refusal to accept the offer in writing. We are of the view that the practices were in line with the relevant procedures.

9. However, between March and mid-May 2024, while LCSD was in ongoing liaison with RVD regarding the monthly fee for Permit A (see **paras. 4(7) and (10)**), Mr X contacted Ms B on 19 April 2024, telling her that their tender was unsuccessful and requesting a clear-out of the business premises (see **para. 4(9)**). Regardless of whether he used the words "tender failed" at that time, Mr X confirmed that he had told Ms B that their tender was unsuccessful (see **para. 6**). From the complainants' perspective, this signified the end of the tender process. Furthermore, on the morning of 17 May, Mr X and ArchSD staff inspected the light refreshment kiosk at the Park jointly with Ms B, specifically requesting her to follow up on the demolition arrangements for the premises. As normally understood, this confirmed that their business operations would certainly not continue after the expiry of Permit A's contract. To their surprise, on the afternoon of the same day, Mr X enquired with Ms B if she would consider accepting LCSD's new contract (see **para. 4(11)**). Inevitably, LCSD was perceived by the complainants to be confusing in handling the tender for Permit A, and its actions and decisions were self-contradictory.

10. After scrutinising the relevant information and records, we consider that the crux of the matter was Mr X's inadequate communication with his colleagues within the department responsible for liaising with RVD, resulting in his failure to keep abreast of LCSD's latest position in handling the tender price. Shortly after Mr X, on behalf of LCSD, had notified the complainants that their tender was unsuccessful and instructed them to restore the business premises to original status, he then indicated acceptance of

their tender offer, leaving the complainants at a loss. We find the handling process unsatisfactory. Meanwhile, misunderstanding was caused by inadequate explanation given by LCSD in negotiating with the complainants on the monthly fee for Permit A and the execution of new contract. As admitted by LCSD, the misunderstanding could have been avoided if Mr X had kept proper written records and confirmation of his negotiation with the complainants on the tender price of Permit A, and had explained to them in the process the rationale for invoking the relevant terms. Moreover, although LCSD stated that it had formulated departmental guidelines on tender procedures based on the Government's Stores and Procurement Regulations ("SPR"), and had reminded its staff to follow the procedures in the SPR in handling the work relating to "Negotiation", it appeared that in the present case, Mr X did not have a clear grasp of the relevant requirements and procedures in the SPR.

Conclusion

11. Based on the above analysis, The Ombudsman considers the complaint **partially substantiated**.

Recommendations

12. The Ombudsman recommends that LCSD:

(1) learn from this case and step up training for relevant staff;

(2) enhance internal communication among departmental staff to ensure that all staff responsible for the same tender project (including those who communicate with tenderers) are kept abreast of the latest progress of the tender;

(3) consider introducing measures to remind staff of the proper procedures and points to note (including written confirmation) when negotiating for tenders in future;

(4) consider introducing measures to make tenderers aware of the "Negotiation" clause in the tender document and how the department will execute it; and

(5) share this case with relevant staff (especially those responsible for handling permits and tender exercises) to avoid recurrence of similar situations.

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